

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keeler Transport, Inc., :
Petitioner :
 :
v. : No. 820 C.D. 2011
 : Submitted: September 30, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge¹
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge²

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: January 9, 2012

Keeler Transport, Inc., (Employer) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) granting unemployment compensation benefits to Mark G. Trago (Claimant). Employer asserts that the Board erred in finding Claimant, employed as a truck driver, eligible under Section 402(e.1) of the Unemployment Compensation Law³

¹ The decision in this case was reached prior to January 7, 2012, when Judge Pellegrini became President Judge.

² This case was decided before Judge Butler's term ended on January 2, 2012.

³ Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, added by Section 3 of the Act of December 9, 2002, P.L. 1330, 43 P.S. § 802(e.1). Section 402(e.1) of the Law provides:

An employe shall be ineligible for compensation for any week-

(e.1) In which his unemployment is due to discharge or temporary suspension from work due to failure to submit and/or pass a

(Footnote continued on the next page . . .)

(Law), notwithstanding his refusal to take a random drug and alcohol test. We reverse.

Employer operates a small commercial trucking business for which Claimant worked as a full-time driver from January 26, 2010, to November 10, 2010. On Friday, November 12, 2010, Claimant was randomly selected to submit to a drug and alcohol test as required by Federal Motor Carrier Safety Administration (Federal) regulations. *See* 49 C.F.R. §382.305(a), (k)(1), (l).⁴ Employer attempted to contact Claimant by cell phone and by email, to make him aware of this selection because he was off work on the day of his selection.

(continued . . .)

drug test conducted pursuant to an employer's established substance abuse policy, provided that the drug test is not requested or implemented in violation of the law or of a collective bargaining agreement.

43 P.S. § 802(e.1).

⁴ In relevant part, it provides,

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(k)(1) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced.

(l) *Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.*

49 C.F.R. §382.305(a), (k)(1), and (l) (emphasis added).

Unbeknownst to Employer, Claimant had left town to visit his family in Connecticut and did not take his cell phone. Accordingly, Employer's calls were not successful.

When Claimant returned home on Sunday evening, November 14, 2010, he found Employer's messages on his cell phone and on his computer. Claimant responded by email, stating that he would take the drug test Monday evening, November 15, 2010, after he made a delivery to Swansea, Massachusetts. Early Monday morning Claimant drove Employer's truck to pick up the trailer destined for Massachusetts. Because the trailer was not at the designated spot, Claimant returned home. Later that day Employer notified Claimant that he was terminated because he had driven Employer's truck Monday morning without first taking the drug and alcohol test.

Claimant applied for unemployment compensation, stating that he was fired for safety reasons. Employer responded by explaining its decision and providing supporting documentation to the Unemployment Compensation Service Center (UC Service Center). This documentation included, *inter alia*, a letter, a copy of Employer's policy and a receipt, signed by Claimant, acknowledging his understanding of Employer's policies and Federal regulations.⁵ Employer explained that Claimant was terminated because of a "complete disregard for safety, company policies and federal regulations." Certified Record, Item 3, Employer Separation Information, at 3 (C.R., Item ____). Employer noted that the

⁵ Employer also noted other violations of its safety policies committed by Claimant. Included in Employer's documentation was a letter to Claimant dated September 17, 2010, whereby Employer stated that if there were "[a]ny other problems regarding safety . . . you will be terminated." C.R., Item 3 at 13.

“final incident” occurred when Claimant drove the company vehicle without first taking the drug and alcohol test, as required by Federal regulations. *Id.*

The UC Service Center found Claimant ineligible for benefits under Section 402(e.1) of the Law because he had refused to take the drug and alcohol test as directed. Claimant appealed, asserting that he did not refuse, and a hearing was held before a Referee. Employer did not appear at the hearing. At the hearing, the Referee placed numerous exhibits into evidence, without objection, including Employer’s Questionnaire and all of its supporting documentation. C.R., Item 9, Notes of Testimony at 1-2 (N.T. ___).

Claimant then testified. Claimant stated that he was discharged for a safety violation, and he stated that he did not refuse to take the drug and alcohol test. Specifically, Claimant stated that the email he received from Employer did state that he had to take the test before going to Massachusetts. Claimant stated that he did not know he could not drive the truck without first taking the test.

The Referee reversed the UC Service Center and granted Claimant benefits, concluding that Claimant did not refuse to submit to a drug and alcohol test. C.R., Item 10, Referee’s Decision of 2/24/11 at 1. The Referee found Claimant’s testimony to be credible and concluded that Employer failed to sustain its burden under Section 402(e.1) of the Law.

Employer appealed, once again arguing that Claimant was terminated due to “a complete disregard for safety, company policies, and federal regulations.” C.R., Item 11 at 2. Employer’s appeal was based upon the documents that were admitted into the record by the Referee. This documentation showed that Claimant had been warned, in writing, that another safety violation would result in a discharge. It also showed that Claimant had acknowledged, in

writing, the work rule and the Federal regulation that required employees randomly selected for drug screenings had to submit to testing immediately. The Board affirmed the Referee, adopting his findings of fact and conclusions of law. Employer now appeals to this Court.⁶

Employer raises two issues on appeal.⁷ First, Employer contends that the Board misconstrued the basis for Claimant's termination. Specifically, Employer argues that Claimant violated its work rule and Federal regulation by operating a company truck after receiving notice he was selected for a drug and alcohol test but before taking the test. Moreover, Employer notes that Employer would have violated the FMCSA had it allowed Claimant to drive its truck without first taking the drug test. This would subject Employer to fines and other penalties. *See, e.g., United States v. Murtana*, 172 Fed. Appx. 468 (3d. Cir. 2006). Second, Employer argues that the Board disregarded the evidence regarding Claimant's history of multiple accidents, safety violations, and violations of company policy, as provided in its documentation.

In response, the Board concedes that Employer established the existence of its work rule, but it argues that Employer did not prove a violation of it. Specifically, the Board argues that Claimant did not deliberately refuse to

⁶ Our review is limited to determining whether constitutional rights were violated, whether errors of law were committed, and whether findings of fact are supported by substantial evidence. *Greer v. Unemployment Compensation Board of Review*, 4 A.3d 733, 736 n.4 (Pa. Cmwlth. 2010). Moreover, we must examine the evidence in the light most favorable to the party who prevailed before the Board, giving that party the benefit of any inferences logically and reasonably drawn from the evidence. *Gibson v. Unemployment Compensation Board of Review*, 760 A.2d 492, 494 (Pa. Cmwlth. 2000).

⁷ Prior to its appeal to this Court, Employer had been proceeding *pro se*. For purposes of this appeal Employer has now retained counsel.

submit to the drug and alcohol test. The Board contends that even if Claimant violated Employer's established drug and alcohol testing policy, it was not his fault. *See* Board's Brief at 7.

In *UGI Utilities, Inc. v. Unemployment Compensation Board of Review*, 851 A.2d 240 (Pa. Cmwlth. 2004), this Court held that Section 402(e.1) of the Law governs discharges related to drug tests and not the general willful misconduct discharge governed by Section 402(e) of the Law. *UGI Utilities*, 851 A.2d at 245. *See also Architectural Testing, Inc. v. Unemployment Compensation Board of Review*, 940 A.2d 1277, 1281 (Pa. Cmwlth. 2008) (noting both the failure of a drug test, and the refusal to take a drug test, are now analyzed under Section 402(e.1)). Accordingly, Section 402(e.1) requires an employer to (1) demonstrate that it adopted a substance abuse policy; and (2) that the employee violated that policy. *UGI Utilities*, 851 A.2d at 252. Further, the policy permitting drug and alcohol testing need not be detailed. *Architectural Testing*, 940 A.2d at 1282. Once the employer establishes the policy, the burden shifts to the employee to show that the policy was either trumped by a statute or collective bargaining agreement. *UGI Utilities*, 851 A.2d at 252.

Here, Employer's substance abuse policy states that

[r]efusal to submit to a requested alcohol or drug test is grounds for immediate discharge. Refusal includes refusing to report *immediately* to the testing location upon request

C.R., Item 3 at 6. The Federal regulation, by which Employer is bound, also states that drivers must report *immediately* for testing. 49 C.F.R. §382.305(l). The Federal regulation provides that an employee is considered to have refused a drug test when he "fail[s] to appear for any test . . . within a reasonable time, as

determined by the Employer, . . . after being directed to do so by the employer.”
49 C.F.R. §40.191(a)(1).⁸

By email, Employer notified Claimant at 1:19 p.m. on Friday November 12, 2010, that it had been trying to reach him and had left several messages on his cell phone informing him that he had been randomly selected for a drug screen. Employer’s email stated that Claimant was to report to the testing facility by 8:00 p.m. that evening. In that email, Employer added that Claimant had a “load going to Swansea[,] MA for Monday [at] 1215.” C.R., Item 3, at 9. Claimant responded at 6:10 p.m. on Sunday, November 14, 2010, that he would go to the test center “as soon as [he got] back from Swansea.” *Id.* at 10.

Claimant did not comply with the requirement to proceed *immediately* to the testing facility, *i.e.*, first thing Monday morning. Telling Employer that he would go for the drug screen after he returned from Massachusetts constitutes a “refusal” as that term is defined in Employer’s substance abuse policy and in FMCSA regulations. Claimant argues that he promised to take the test, after completing a truck run. However, by not presenting himself immediately to the testing center before driving Employer’s vehicle, Claimant refused the test. Claimant’s testimony confirmed this chain of events. Thus, the evidence showed

⁸ It provides:

- a) As an employee, you have refused to take a drug test if you:
 - (1) Fail to appear for any test . . . within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. . . .

49 C.F.R. §40.191(a)(1).

that Claimant violated Employer's substance abuse policy and FMCSA regulations.

The Board argues that it was Employer's fault that Claimant missed his *random* drug testing selection and, thus, Employer should have made alternate arrangements. The Board's position eviscerates the impact of the random drug and alcohol screenings of truck drivers. Because truck drivers never know when they will be called upon to submit immediately to a drug and alcohol test, they have a strong incentive not to indulge. The random and immediate testing deprives truck drivers of the opportunity to metabolize whatever drugs may be affecting them.

Claimant's refusal to take a drug test rendered him ineligible under Section 402(e.1) of the Law. Accordingly, we reverse.⁹

MARY HANNAH LEAVITT, Judge

⁹ Given our ruling we need not address Employer's second argument.

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ORDER

AND NOW, this 9th day of January, 2012, the order of the Unemployment Compensation Board of Review, dated April 11, 2011, in the above-captioned matter is hereby REVERSED.

MARY HANNAH LEAVITT, Judge